Supreme Court, U.S.
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No. 86-1469 (3)

IN THE

Supreme Court Of The United States

October Term, 1986

STATE OF ALABAMA,
Petitioner

vs.

MARK MONROE GEESLIN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE STATE DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO FAIR TRIAL AND DUE PROCESS BY INTENTIONALLY WITHHOLDING EXCULPATORY RESULTS OF SCIENTIFIC TESTS ON SEMEN SAMPLES, DESPITE THE FACT THAT THE DEFENDANT HAD MADE A REQUEST FOR ALL SCIENTIFIC TEST RESULTS, NEITHER THE DEFENDANT NOR HIS ATTORNEY WERE AWARE OF THE RESULTS ON THE SEMEN SAMPLES, AND THE EVIDENCE WAS DISPUTED AS TO WHETHER OR NOT THE DEFENDANT HIMSELF WAS AWARE THAT ANY TEST HAD BEEN PERFORMED?

U.S. Const., amend. XIV

Ala. Const. 1901, Art. I, § 6

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STATEMENT OF FACTS

The Defendant, Mark Monroe Geeslin, was charged with the offense of first degree rape and first degree kidnapping. The only eye witness to the crime was the victim herself, Mrs. Linda Watts. The crime took place after 9:00 o'clock P.M. (R. 41, 49, 94). The victim described her attacker as unshaven and having several days growth of beard. (R. 56-61). There were numerous witnesses for the Defendant who testified that the Defendant was clean shaven on the day in question and was at home by shortly after 9:00 o'clock P.M. (R. 248, 252, 268, 271, 280, 284, 286, 292, 298, 303, 315, 318, 330, 338, 346).

Immediately after the rape, the Huntsville Police Department took the victim to have a "rape kit" performed. (R. 36, 57). The semen samples taken from the victim showed the presence of gonorrhea. (R. 409).

Twelve (12) days after the rape the Defendant was taken by the Huntsville Police Department for medical tests. (R. 404). The Defendant tested negative for gonorrhea. (R. 404). The Defendant claims that he thought they were routine tests and did not know that he was being tested for gonorrhea. (R. 430). Detective Parker of the Huntsville Police Department testified that he told the Defendant that he was being tested for gonorrhea. (R. 422). In any event, the facts are undisputed that the Defendant, Mark Monroe Geeslin, was never told the results of his tests or that the semen samples taken from the victim contained gonorrhea.

The Defendant's only attorney of record was Joe M. Berry. Mr. Berry did not discover the results of these scientific tests until two (2) weeks after the trial. (R. 450). Prior to the trial, he had filed a Motion pursuant to Rule 18.1 (d) of the *Alabama Rules of Criminal Procedure*. (R. 438). This Motion, which was granted by the Trial Judge, specifically requested results of all scientific tests. The prosecution responded by stating that "only tests known to State at this time was that performed by State Department of Forensic Science on hair, saliva, etc." (R. 439, 439).

The evidence is undisputed that the prosecution actually had full knowledge that the semen samples taken from the victim contained gonorrhea, and that the tests performed on the Defendant were negative for gonorrhea. (R. 404, 473). In fact, the prosecuting Assistant District Attorney himself was told by the State's expert that Geeslin's samples could be tested for antibiotics which would prove conclusively that Geeslin could not in fact have been the person who committed the rape. (R. 424). These tests were never performed.

After discovering that these exculpatory scientific test results had been deliberately withheld, the Defendant's counsel moved for a new trial based on the nondisclosure. (R. 450-457). The

Trial Court, as well as the Alabama Court of Criminal Appeals, held that since the Defendant himself knew tests were performed on him, he had the "essential facts" which should have led him to discover the results. The Supreme Court of Alabama, however, disagreed and reversed the lower Courts' decisions. In doing so, it stated that "because the Assistant District Attorney's failure to comply with the motion to produce exculpatory evidence adversely affected the fundamental fairness of Geeslin's trial, Geeslin was denied his right not to be deprived of liberty without due process of law". The Supreme Court of Alabama then cited the 14th Amendment to the U. S. Constitution and Section 6 to the Alabama Constitution. The facts set forth above are basically contained within the Alabama Supreme Court's decision. That decision has been produced as "Appendix B" with the State's Petition For Writ of Certiorari. It should be noted that the State's Petition For Writ of Certiorari sets forth only those facts contained within the Court of Criminal Appeals' decision. That opinion as well as the petitioner's brief reaches different factual conclusions than does the Alabama Supreme Court's opinion.

For example, the Alabama Supreme Court's opinion does not support the factual conclusion that the "test could easily have been obtained by Appellant (Defendant) from the State lab." Neither does it support the factual conclusion that the "Appellant was on notice of the essential facts which would have enabled him to take advantage of the gonorrhea test conducted by the State."

SUMMARY OF ARGUMENT

The State of Alabama has made two factual errors in its argument. First of all, neither the Defendant nor his attorney were aware that the semen samples taken from the victim indicated gonorrhea, or that Defendant's tests proved negative for gonorrhea. Therefore, the State's argument is erroneous in concluding that the Defendant had the "essential facts" to lead him to discover the test results. Secondly, the test results were

in the exclusive possession of the State, and the Defendant's counsel followed the applicable statutes in order to obtain the results of the tests which were unknown to him. The State's argument is erroneous in concluding that the defense was not diligent in trying to obtain the results to all scientific tests.

The State of Alabama has also erred in its legal reasoning. More specifically, the State has failed to cite any cases directly on point dealing with non-disclosure of scientific test results. Rather, the State has chosen to cite language taken out of context from irrelevant cases, as opposed to citing cases directly on point. *Hilliard v. Spaulding,* 719 F.2d 1443 (9th Cir. 1983) and *United States v. Poole,* 379 F.2d 645 (7th Cir. 1967) are cases directly on point that would require a reversal. The Respondent, Mark Monroe Geeslin, respectfully submits to this Honorable Court that the Supreme Court of Alabama was correct in ruling that Respondent was denied his right to fair trial and due process of law.

ARGUMENT

I. The Supreme Court Of Alabama Was Correct In Holding That The Trial Court And Court Of Criminal Appeals Erred In Concluding The Facts Did Not Support A "Suppression".

The Court of Criminal Appeals concluded that since the Defendant knew a test had been performed on him, he had the "essential facts" to lead him to obtain the results of the tests. Therefore, there was not a "suppression" under *Brady v. Maryland,* 373 U. S. 83 (1963).

The Supreme Court of Alabama disagreed and reversed the lower court's ruling. The lower courts had erred in concluding that "the Defendant was aware of facts which should have led him to discover the test results". As explained in the Alabama Supreme Court's opinion, the facts were undisputed that Geeslin was not told that a semen sample from the victim indicated gonorrhea or that his test proved negative. The tests

themselves were performed by the State and were kept in the State's exclusive possession. The Defendant's counsel had followed Rule 18.1 (d) of the Alabama Rules of Criminal Procedure in specifically requesting all exculpatory test results and reports. The prosecution, however, deliberately withheld these exculpatory test results even though "he knew of it well before he filed the response to the motion for production". The Defendant's counsel did not discover the test results until two weeks after the trial.

Therefore, the Defendant's attorney did everything he legally could to discover the unknown test results. The State does argue in its brief that "Respondent's attorneys could have telephoned the County Health Department and found out the test results just as easily as the prosecution did", but this is ridiculous. A defense attorney can not get any medical information without signed medical releases, except through the Court. There was no chance of getting a release from the victim. It may have been possible to subpoena the test results, but the defense attorney did not know the test results existed or where they were in order to subpoena them. The proper procedure through the Court is under Rule 18.1 (d), which the defense attorney followed.

"Suppression" has been defined as the "nondisclosure of evidence that the prosecution, and not the defense *attorney,* knew to be in existence." *Odgen v. Wolff,* 522 F.2nd 816, 820 (8th Cir. 1975). The evidence is undisputed that the prosecution was aware of the test results, yet the defense attorney did not discover them until two weeks after trial. The State tries to get around the definition above by claiming that "at no time did the prosecution ever receive a written report on the test results".

The law is quite clear, however, that the prosecution "must disclose all exculpatory information in the possession, custody or control of any branch of the government which is known, or, by the exercise of due diligence, may become known to the prosecution". *U. S. v. Gerrity,* 481 F. Supp. 119 (D.C. D.C. 1978). *Gerrity* explained that this obligation goes far beyond

the District Attorney's department and extends to information being held by any branch of government which aided the prosecution. Under our present facts, the Huntsville Police Department, the Department of Forensic Sciences, and the Madison County Health Department were acting as "arms of the state" in pursuing a criminal investigation. (R. 423, 415). *Pina v. Henderson,* 752 F.2d 47 (2d Cir. 1975).

Finally, the State tries to get around the definition by arguing that the attorney who represented the Defendant at the time of the test (Mark McDaniel) was told the tests were being performed. As the Supreme Court of Alabama pointed out, however, "there is no indication, however, that the police told that attorney of the gonorrhea test or the reason for it, and they could not have given him the results, which were only obtained later." In addition, "at the time the samples were taken from Geeslin, he was not represented by the lawyer who later made the motion for production, who represented Geeslin at the trial, and who, in fact, was the only counsel of record throughout the proceeding below." Furthermore, when Geeslin's trial counsel made the motion for production the prosecutor "had no indication that the attorney knew of the positive gonorrhea culture from the victim or of the test conducted on Geeslin or the results of that test."

In summary, the Supreme Court of Alabama was correct in holding that there was a "suppression" under *Brady*. The lower courts had erred in concluding that the defense was aware of the facts that should have led him to discover the test results.

II. The State Of Alabama Clearly Violated The Defendant's Constitutional Right To Due Process By Failing To Disclose The Scientific Test Results.

The State argues that the Defendant himself had the "essential facts" from which he should have discovered the test results. Therefore, there could not have been a "suppression" even though his attorney had no knowledge of the "essential facts". The Alabama Supreme Court did not agree with this factual

conclusion. Even if you assume for the sake of argument that the defense should have discovered the test results, however, the Supreme Court of Alabama would still have been correct in reversing the lower courts.

There have been numerous Federal Court decisions which have held that it would be a reversible error for the prosecution to withhold exculpatory scientific evidence, even if the defense should have discovered the test results. *Davis v. Pitchess,* 518 F.2d 141 (9th Cir. 1974); *United States v. Poole,* 379 F.2d 645 (7th Cir. 1967); *Levin v. Katzenback,* 124 U.S.App.D.C. 158, 363 F.2d 287 (1967); *Hamric v. Bailey,* 286 F.2d 390 (4th Cir. 1967); *Castleberry v. Crisp,* 414 F.Supp. 945 (D.Okla. 1976). Even more specifically, the Courts have explained that test results from semen samples are so important that their absence from the trial prevents the accused from receiving his constitutionally guaranteed fair trial. *Hilliard v. Spaulding,* 719 F.2d 1443 (9th Cir. 1983).

In *Hilliard,* the Court went on to explain as follows:

> The government's suppression of this type of evidence, which deprives the Defendant from what could be his only opportunity to conclusively prove his innocence, can not withstand constitutional scrutiny. We therefore hold that in a case of this type if a sperm sample is taken from the victim and the prosecution is in possession of or has control over this sample, and is aware of its exculpatory nature, the prosecution is constitutionally required to disclose the existence of the sample, to make it available to the defense, even if defense counsel does not specifically request that the prosecution do so.

This Honorable Court should also note that the dissenting opinion in *Hilliard* points out that both the Defendant and his counsel were aware that the semen slides had been prepared prior to trial. The majority, however, concluded that the semen slides were so vitally crucial to the trial that the Defendant could not possibly receive a fair trial without it being disclosed to the jury.

The facts in our case are even more favorable to the Defen-

dant. Our facts are undisputed that the Defendant's attorney did not discover the results from the scientific tests until two weeks after the trial. (R. 450).

Similar to our present case, in *Poole,* supra, the prosecution also argued that its failure to disclose certain scientific test results should be excused due to the defense's lack of due diligence. The Court, in its opinion, agreed with the prosecution that the defense counsel was not diligent in following up on information obtained at the preliminary hearing which could have led to the undisclosed evidence. The Court went on to explain, however, that the government failed to correct the misinformation in *Poole,* and the Defendant should not suffer for the mistake of his counsel. It was stated that "under these circumstances, we think the interest of truth, and of the Defendant, would have been served materially if the reports would have been disclosed".

Similarly, in *Davis v. Pitchess,* supra, the 9th Circuit also held that evidence of this nature which would scientifically establish that the Defendant was not the attacker must be available for trial, or it would be impossible for the Defendant to receive a fair trial. Very similar arguments made by the State in the present case were also made in *Levin,* supra, and *Castleberry,* supra. In *Levin* the U. S. Court of Appeals addressed the issue as follows:

> Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of the newly discovered evidence. But the Appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceeding, and relief, either on a motion for a new trial or for *habeas corpus,* may not depend on whether more able, diligent, or fortunate counsel might have possible come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverest party, or the one with the greatest resources, to be the winner. (at p. 291).

Castleberry addressed the same argument being made by the State of Alabama as follows:

> While it is relevant to determine whether defense counsel had independent knowledge of the evidence, whether a request was made, and whether the evidence was intentionally or unintentionally withheld, the basic test is whether the undisclosed evidence was so important that it's absence prevented the accused from receiving his constitutionally guaranteed fair trial.
>
> As stated in *United States vs. Hibler,* 463 F.2d 455 (9th Cir. 1972);
>
> That defense counsel did not specifically request the information, that a diligent defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; due process can be denied by failure to disclose alone. (At p. 404).

All of these cases cited immediately above are aimed at insuring that the accused receives a fair trial. As repeated by the Alabama Supreme Court in the present case, "the State's chief business is not to achieve victory but to establish justice".

Semen samples taken from the rape victim contained gonorrhea. Mark Geeslin was tested for gonorrhea by the State twelve (12) days after the alleged rape. His tests proved negative, and there was no evidence whatsoever that he had had any antibiotics to alter the test results.

This scientific evidence conclusively proves that Mark Monroe Geeslin is innocent of the crime for which he was convicted. The evidence is also undisputed that the prosecutor intentionally withheld these test results, which took away the only opportunity the Defendant had to conclusively prove his innocence. This certainly prevented a fair trial, and this certainly cannot withstand constitutional scrutiny. *Hilliard,* supra; *Poole,* supra.

The State has cited a line of cases for the proposition that there is not a suppression under *Brady* so long as the Defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence. This language originated with a line of 2nd Circuit cases dealing with the discovery of prior inconsistent statements. *United States v. Ruggiero,* 472 F.2d 599 (2nd Cir. 1973); *United States v. Robinson,* 560 F.2d 507

(2nd Cir. 1977); *United States v. Stewart,* 513 F.2d 957 (2nd Cir. 1975); *United States v. Brown,* 582 F.2d 197, 200 (2nd Cir. 1978); *United States v. Leroy,* 687 F.2d 610, 618 (2nd Cir. 1982). This language has also been adopted by the 5th and 11th Circuits. *United States v. McKenzie,* 768 F.2d 602, 608 (5th Cir. 1985); *Jarrell v. Balkcom,* 735 F.2d 1242, 1258 (11th Cir. 1984).

A close reading of each of these cases, however, will show they are not on point with our present fact situation. The "essential facts" language originated out of the 2nd Circuit while dealing with impeachment testimony only. More specifically, the 2nd Circuit Court of Appeals has ruled that the prosecution does not have to reveal impeachment testimony obtained from potential witnesses, so long as the name of those witnesses are available to the defense. There is not a single case cited by the State which deals with the nondisclosure of scientific test results. In fact, the State has not argued a single case on point with our present fact situation.

Hilliard, supra, and *Poole,* supra, dealt directly with the nondisclosure of tests concerning semen samples. In both of those cases the 9th and 7th Circuits expressly and specifically held that the test results must be disclosed to the Defendant's counsel. This was true in *Hilliard* even though "the Defendant and his counsel were made aware that a sperm slide had been prepared". This was true in *Poole* even though the Court expressly stated that the "defense counsel was not diligent". Therefore, the prosecution for the State of Alabama clearly violated the Defendant's constitutional right to a fair trial and due process by failing to disclose the test results.

CONCLUSION

In conclusion, the Respondent respectfully requests that this Honorable Court deny the State of Alabama's Petition for Writ of Certiorari. This request is made because the Supreme Court of Alabama was correct in holding that the Defendant, Mark Monroe Geeslin, was denied his right not to be deprived of liberty without due process of law.

Respectfully submitted,

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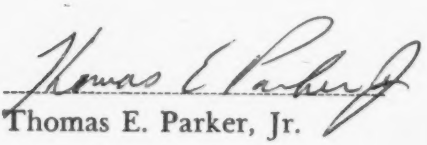
and Baxter, P.C.
Attorneys for Defendant

By: 
Thomas E. Parker, Jr.

CERTIFICATE OF SERVICE

I, Thomas E. Parker, Jr., a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Mark Monroe Geeslin, hereby certify that on this the 8th day of April, 1987, I did serve the requisite number of copies of the foregoing on the Attorneys for the State of Alabama, by mailing the same to them first-class postage prepaid and addressed as follows:

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